

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

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COURT OF APPEALS
DIVISION TWO

IN RE JAIR V.

) 2 CA-JV 2007-0081

) DEPARTMENT B

) MEMORANDUM DECISION

) Not for Publication

) Rule 28, Rules of Civil

) Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18140001

Honorable Ted B. Borek, Judge

VACATED IN PART AND REMANDED

Barbara LaWall, Pima County Attorney
By Scott Christensen

Tucson
Attorneys for State

Nuccio & Shirly, P.C.
By Jeanne Shirly

Tucson
Attorneys for Minor

E S P I N O S A, Judge.

¶1 Jair V., born in March 1991, admitted two counts each of theft of a means of transportation and burglary and one count of possession of burglary tools. The juvenile court adjudicated Jair delinquent, placed him on juvenile intensive probation supervision for one year, not to exceed his eighteenth birthday, and ordered him to pay \$24,735.11 in restitution at the rate of \$1,000 per month. On appeal, Jair challenges the court's restitution

order, arguing the monthly payments are unreasonable. He asks that we order the court to reevaluate his financial circumstances and reduce the monthly payment required. We review a restitution order for an abuse of discretion. *See State v. Reynolds*, 171 Ariz. 678, 681, 832 P.2d 695, 698 (App. 1992). “In exercising its discretion, the juvenile court is not, however, authorized to misapply the law or a legal principle.” *In re Maricopa County Juv. Action No. JV-128676*, 177 Ariz. 352, 353, 868 P.2d 365, 366 (App. 1994). Finding that the court abused its discretion, we vacate that portion of the restitution order setting the monthly payment at \$1,000 and remand as set forth below.

¶2 In what is commonly referred to as the victims’ bill of rights, which applies in juvenile matters, *see* A.R.S. § 8-381, the Arizona Constitution confers on victims the right “[t]o receive prompt restitution from the person . . . convicted of the criminal conduct that caused the victim’s loss or injury.” Ariz. Const. art. II, § 2.1(A)(8). Section 8-344(A), A.R.S., requires a juvenile court, “after considering the nature of the offense and the age, physical and mental condition and earning capacity” of a delinquent juvenile, to “order the juvenile to make full or partial restitution to the victim of the offense for which the juvenile was adjudicated delinquent” The propriety and amount of restitution must be established by a preponderance of the evidence. *See In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 118 (App. 2003).

¶3 At the disposition hearing, the parties stipulated to an interim amount of restitution with the understanding that the final amount would be determined at a later hearing. The juvenile court asked Jair about his employment status, to which he responded,

“I don’t have a job yet, but I am at the electronic shop so he is willing to give me a job there.” Jair’s attorney also informed the court that Jair was currently unemployed and asked the court to wait to impose a restitution order until he got a job to avoid “overwhelming” him and setting him up for failure. The court responded as follows:

I will include that it can be paid at \$1,000 a month but that is open to the next hearing and you can come back and perhaps reduce it.

By the next time I want [Jair] to have something out there as a goal . . . that’s reasonable with the amount he has.

. . . .

You can come back on the 1st of October and maybe have [the restitution] adjusted and demonstrate that [Jair] is taking that restitution seriously.

He doesn’t have a job now and I know school is important but so are the consequences of the others.

¶4 At the review hearing the next month, the probation officer informed the juvenile court, and the state agreed, that the purpose of the hearing was to finalize the amount of restitution as to one remaining victim. Neither Jair nor his attorney requested that the previously imposed monthly payments be reduced, nor did they tell the court whether Jair had obtained employment in the month since the last hearing. Without objection, the court found, “That would make a total amount of restitution owed to be \$24,735.11. And this would be a final order with regard to restitution and the remaining aspects are remaining the same.”

¶5 Jair does not dispute the total restitution award but argues the juvenile court failed to consider his earning capacity, as § 8-344(A) requires, when it ordered him to pay \$1,000 per month. He contends his earning capacity is limited by his youth and the number of hours he is able to work while also attending high school and counseling sessions and performing community service, all conditions of his probation. In addition, because his probation requires that he make timely monthly restitution payments, he argues it will be “impossible” for him to succeed on probation. He contends the victims will not be deprived of the restitution due them if he is permitted to make smaller monthly payments, given that any amount of restitution that remains unpaid when he turns eighteen can be converted into a civil judgment. *See* § 8-344(F).

¶6 In light of Jair’s inexplicable failure at the second hearing to challenge the amount of the payment previously imposed or to provide a proposed payment “goal” as the court had requested at the prior hearing, the state suggests Jair has waived the right to challenge the monthly payments. In a somewhat analogous situation involving an adult defendant, Division One of this court found that it would be “fundamentally unfair under the Fourteenth Amendment to deprive [a] probationer of his conditional freedom simply because he could not pay the fine through no fault of his own” and that his failure to object to the court’s failure to inquire into the reason the defendant had not paid his fines or restitution was fundamental and could not be waived. *State v. Wilson*, 150 Ariz. 602, 605, 724 P.2d 1271, 1274 (App. 1986). By extension, therefore, assuming without deciding that Jair has not waived his right to raise this issue, we address his claim.

¶7 In light of the similarities between the adult and juvenile restitution statutes, see *In re Erika V.*, 194 Ariz. 399, ¶ 4, 983 P.2d 768, 769 (App. 1999), we look to the law applied in the adult context for guidance in determining the outcome here. In *State v. Hawkins*, 134 Ariz. 403, 406, 656 P.2d 1264, 1267 (App. 1982), Division One found that the restitution imposed was improper in light of the defendant's inability to pay it. The court discussed the constitutional implications that may arise when a sentencing judge does not make specific findings or the record does not show that the defendant is able to pay the restitution ordered, particularly when probation can be revoked and incarceration ordered for failure to pay. See *id.*; see also *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (sentencing court must inquire into reasons for a probationer's failure to pay fines or restitution before sentencing him to prison for failure to pay); cf. *In re Maricopa County Juv. Action No. JV-125409*, 172 Ariz. 385, 387, 837 P.2d 187, 189 (App. 1992) (probation fee proper even if court fails to specifically set forth juvenile's financial status when clear from record court considered ability to pay).

¶8 The state suggests that once Jair told the juvenile court he anticipated getting a job at an electronics store, there was sufficient evidence to justify imposing a monthly payment of \$1,000. However, based on the limited information before the court, which notably did not include whether Jair had actually secured a job or how much he might be earning, we cannot agree. Moreover, because making timely restitution payments is a condition of Jair's probation, his failure to do so would guarantee his failure on probation. See *In re Kristen C.*, 193 Ariz. 562, ¶ 14, 975 P.2d 152, 155 (App. 1999) (juvenile court

“might take a different view” of restitution order if juvenile faced jail time for failure to pay). Although it is clear from the record that the court intended to consider Jair’s earning capacity, in the absence of any evidence that it actually did so, we conclude the court abused its discretion by ordering Jair to pay \$1,000 per month in restitution.¹

¶9 “When an appellate court cannot determine the basis of the restitution order from the record, the proper remedy is to vacate that portion of the sentence, and remand to the trial court to reconsider the propriety of the restitution order and to specify the basis for its determination.” *State v. Iniguez*, 169 Ariz. 533, 538, 821 P.2d 194, 199 (App. 1991). Because we cannot determine the basis of the juvenile court’s order requiring Jair to pay \$1,000 per month, we vacate that portion of its order and remand so the court can consider Jair’s earning capacity in determining an appropriate monthly payment.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

¹We do not suggest the juvenile court had intended setting Jair up for failure; rather, the record suggests the court chose a high restitution amount to motivate him to make substantial progress.

GARYE L. VÁSQUEZ, Judge